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No. 403

In the Supreme Court of the United States

OCTOBER TERM, 1960

MORTON BORROW, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-24) has not yet been reported. The decision and order of the Federal Communications Commission (J.A. 75-98) have not been officially reported, but are unofficially reported at 18 Pike & Fischer, Radio Regulation 107.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1960. The petition for a writ of certiorari was filed on September 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission, preliminary to passing upon petitioner's applications for renewal of radio operator licenses, inquired of petitioner whether he was or had ever been a member of the Communist Party or of any organization advocating the violent overthrow of the United States Government. An affirmative answer to either question would not have disqualified petitioner from receiving a license; he still would have been entitled to a full hearing on his application (with right to confrontation and cross-examination) in which *scienter*, among other factors, would be relevant in determining whether a grant of license would serve the public interest. The questions presented are:

1. Whether the Commission had power to ask these questions pursuant to its authority under Section 303(l) of the Communications Act to prescribe qualifications of radio operators and to issue licenses to such United States citizens as it finds qualified.

2. Whether the First Amendment was violated by the Commission's determination that, because of petitioner's failure to answer these questions, it lacked sufficient information on which to base a finding that the grant of petitioner's application would serve the public interest.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et. seq.*) and of the Commission's Rules and Reg-

ulations, in addition to those set forth in the petition (pp. 2-4), are set forth in the Appendix, *infra*, pp. 22-25.

STATEMENT

Petitioner, the possessor of radio operator licenses issued by the Federal Communications Commission, is employed as a technician by a Philadelphia radio broadcasting station under the terms of a collective bargaining agreement which provides that technicians may be required to hold, as a condition to continued employment, a first class operator's license from the Commission. On March 7, 1958, petitioner applied for renewal of his first-class radiotelephone and radiotelegraph licenses (J.A. 77, 22). The Commission, pursuant to Section 1.71(a) of its Rules (47 C.F.R. 1.71(a)), and in accordance with its established policy where "it has occasion to suspect that an individual applicant might seek to utilize the privileges accorded him * * * to effectuate his 'political' views through force and violence or * * * in a manner inimical to the interests of the United States" (J.A. 85), wrote petitioner, on March 17, 1958, that it had "determined that it must have additional information before taking action with respect to your application" (J.A. 24). Specifically he was requested to answer, under oath, the following questions (J.A. 25):

1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership:
2. Are you now or have you ever been a member of any organization or group which advocates

> or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership:

The Commission's letter advised petitioner that he could submit any additional statement or information he might desire and that his failure to file the information requested would constitute grounds for the dismissal of his application (J.A. 24-25).

On April 12, 1958, petitioner wrote the Commission declining to answer because "the Commission does not have the legal authority to require the answers to this questionnaire as a condition for renewal of my license and, further, that it is an infringement of my constitutional rights" (J.A. 26). The Commission replied, on April 21, 1958, that its authority to make the inquiries stemmed from Section 303(l) of the Communications Act which empowered it not only to prescribe technical qualifications of station operators, but in addition "to consider other factors which have a reasonable relationship to the question of whether the grant of an operator license to a particular individual would serve 'public convenience, interest, or necessity'" (J.A. 27-28). The Commission referred petitioner to its decision in a similar case, *Travis Lafferty* (23 F.C.C. 761, 13 Pike & Fischer Radio Regulation 641), stating the Commission's position that such questions must be answered by applicants to whom they are addressed.

In its April 21, 1958 letter, the Commission provided petitioner a further period within which to

submit the requested information and again advised him that failure to respond to the questionnaire, or to request a hearing, would result in dismissal of his application pursuant to Section 1.71(d) of the Commission's Rules (J.A. 28-29). Petitioner again declined to answer and repeated his request for a hearing to "present in the appropriate form my reasons for refusal to answer the questionnaire" (J.A. 26; R. 1). By order of July 30, 1958, the Commission designated petitioner's application for hearing on the following issues (J.A. 76):

> (1) To determine whether Morton Borrow failed to answer lawful questions with respect to his qualifications to be a licensee which the Commission has directed him to answer under oath; (2) To determine in the light of the evidence adduced under Issue 1 whether Morton Borrow possesses the necessary qualifications to hold a radio operator license.

Following full hearing procedures, the Hearing Examiner issued an Initial Decision looking to dismissal of petitioner's application (J.A. 52-71). On December 7, 1959, the Commission, after consideration of exceptions and supporting brief (J.A. 76), released its decision dismissing the application because of its inability to determine, in the absence of the requested information, that a grant would serve the public interest (J.A. 75-98).

Reaffirming its conclusion in *Lafferty*, *supra*, that the questions as to membership in the Communist Party or in organizations advocating the violent overthrow of the Government are relevant to the qualifi-

cations of station operators under Section 303(l) of the Communications Act (J.A. 84-97), the Commission set forth its view as follows (J.A. 84-85):

> The opportunities for untoward activity available to a licensee are so obvious and so appalling as to scarcely require discussion. They range from the inconvenience and damage attendant on the sabotage of an individual station, the adverse impact of which on the national interest has been judicially recognized in [*Didriksen* v. *F.C.C.*, 103 App. D.C. 17 (254 F. 2d 354) (1958)], through the possibility of a ship's operator sending or failing to send given messages with the consequent danger to his vessel; to the very real opportunity for the technician charged with the operation of a commercial station in accordance with the CONELRAD plan to deviate from that plan and make his station a beacon for attacking aircraft or missiles. These opportunities for activities inimical to the public interest are the more insidious in that any individual act, although it might lead to the exposure of its perpetrator and the subsequent revocation of his operating privilege, could in and of itself lead to such devastation that any punitive action against the operator responsible would be totally disproportionate to the harm done. * * *.

The Commission explained (J.A. 86-87, 89, 95), that petitioner's refusal to answer the questions did not form the basis for an adverse finding as to his character qualifications, but was significant only insofar as it deprived the Commission of facts necessary for it to make the requisite statutory finding as

to whether the public interest would be served by a grant of the application.

The Commission also emphasized that its decision did not involve any determination as to whether an applicant should be denied a renewal of his licenses because of present or past membership in the Communist Party or the organizations inquired about in the questionnaire (J.A. 88). It stated (J.A. 88-89):

> Had Borrow provided the requested information, and had the Commission in the light of such information questioned whether the public interest would be served by a grant of the licenses applied for, a hearing upon appropriate issues would have been required at which evidence would have been taken, and at which Borrow would have been accorded full opportunity to present evidence and arguments appropriate to the issues.

At any such hearing, the Commission added (J.A. 86), evidence that the organizations foster or have engaged in unlawful activities, and the applicant's knowledge thereof, would be valid factors for consideration. The Commission further stated that petitioner's failure to allege good cause for refusing to answer the questions as to membership in any organization advocating the violent overthrow of the Government would in itself warrant dismissal of the application (J.A. 97).

On appeal, the court of appeals affirmed. The majority held (Pet. App. 17-21) that the questions involved are within the Commission's authority, under Section 303(l) of the Communications Act and Sec-

tion 1.71 of the Commission's Rules, and pertinent to the qualifications of radio operations in view of the sensitive position such persons occupy in relation to the national defense. The court found no procedural defect in the proceedings or infringement of petitioner's First Amendment rights (Pet. App. 17, 21). Judge Washington, dissenting (Pet. App. 22-24), was of the view that the Commission lacked statutory authority to ask the questions.

ARGUMENT

The petition here presents a limited issue as to the power of the Federal Communications Commission, preliminary to a full hearing upon an applicant's qualifications to hold a radio operator's license in the public interest, to ask him whether he is or was a member of the Communist Party or of any organization advocating overthrow of the Government by force or violence. No question is raised as to the procedures at the hearing which would have been held on the application had petitioner responded (which the Commission has stated would have included confrontation and cross-examination), or as to the substantive standards which would govern approval or disapproval of his application. Petitioner's license was denied solely because his failure to respond to the inquiry deprived the Commission of information which it considered relevant in determining whether a grant would serve the public interest. The court below correctly held that the questions were relevant to a determination of an applicant's qualifications to operate a radio station in the public in-

terest and that no violation of the guarantees of the First Amendment to the Constitution was involved.

1. Section 303(l) of the Communications Act, 47 U.S.C. 303(l), authorizes the Commission "from time to time, as public convenience, interest, or necessity requires" to "prescribe the qualifications of station operators" and to issue operator's licenses "to such citizens of the United States as the Commission finds qualified." Pursuant to this authority, and in keeping with the purposes of "national defense" and of "promoting safety of life and property" set forth in Section 1 of the Act as bases for establishing the Commission, it has prescribed that no license will be issued until an applicant has successfully passed a technical examination "and is found qualified in respect to citizenship, character, and physical condition" (Section 1.71(a) of the Commission's Rules, App. *infra*, p. 24). In furtherance of this responsibility to insure that only qualified persons are licensed, the Commission in recent years has asked the questions in issue of a number of applicants. It has pursued this course when it has had "reason to believe or suspect" that the applicant might utilize the license privileges in a manner inconsistent with the public interest (J.A. 83, 85). See Communications Act, Section 403, 47 U.S.C. 403; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642.

In view of the strategic positions occupied by Commission-licensed radio operators and the opportunities such a license affords to take action detrimental to the public (*supra*, p. 6), the questions asked of petitioner are clearly relevant to a determination of character qualifications. The first-

class radiotelephone and radiotelegraph licenses, for which petitioner applied, afford access to employment in a number of positions related to national defense and public safety; frequently such employment permits the licensee to be in sole and unsupervised control of radio equipment in his charge (J.A. 84). Moreover, the Commission's Rules make first-class radio operators responsible for the technical operation of the CONELRAD program and the instruction of others in CONELRAD procedures (see, *e.g.*, 47 C.F.R. 3.93 and 13.62).[1]

2. The question of Communist Party membership may be relevant to the "competency" or "fitness" of a teacher (*Beilan* v. *Board of Education*, 357 U.S. 399, 405; *Adler* v. *Board of Education*, 342 U.S. 485, 493; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720), or the "reliability" of a subway operator (*Lerner* v. *Casey*, 357 U.S. 468, 476). Just as a "teacher who is organizing a Communist cell in a schoolhouse or a subway conductor who is preparing

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[1] In 1951 Congress granted the President, "in the interest of national security or defense," broad authority to control electromagnetic radiations (Section 606(c) of the Communications Act; Proclamation 2914, 15 F.R. 9029). The President, in turn, has delegated to the Commission authority to "prepar[e] and [put] into effect plans * * * to minimize the use of the electromagnetic radiations of [radio] stations, in event of attack or of imminent threat thereof, as an aid to the navigation of hostile aircraft, guided missiles, and other devices capable of direct attack upon the United States" and authority to "issue appropriate rules, regulations, orders, and instructions, and to take such other action as may be necessary, to assure the timely and effective operation of the plans" (16 F.R. 12452, Secs. 1 and 4).

the transportation system for sabotage would plainly be unfit for his job" (*Beilan, supra*, at 416), so also a radio operator who is planning or instructing others in "acts of sabotage of any vital media jeopardizes highly important public interests" and is not qualified to hold a license from the Commission. *Didriksen* v. *Federal Communications Commission*, 254 F. 2d 354, 356 (C.A.D.C.). While mere membership or past membership in any of the organizations inquired into might not suffice to support a finding of disqualification, such membership is relevant to a Commission determination of qualification. Petitioner, having "blocked from the beginning any inquiry into his Communist [or other organizational] activities, however relevant to his present loyalty" (*Beilan, supra*, at 405), cannot object to the Commission's dismissal of his application; his refusal to answer its inquiries made it "impossible for the Commission to affirmatively find that a grant of such application is in the public interest" (J.A. 84). See *Lerner* v. *Casey*, 357 U.S. 468, 475-478. This is particularly true since (as in *Lerner*) the Commission had expressly informed petitioner "that continued refusal might lead to his [application's] dismissal" (*id.* at 478).

The procedures for considering petitioner's applications, had he answered the Commission's inquiries, raise no substantial question of due process and distinguish this case from *Kent* v. *Dulles*, 357 U.S. 116, and *Greene* v. *McElroy*, 360 U.S. 474, where this Court was unwilling to infer authority to institute the security program there involved from gen-

eral language delegating authority to the Secretaries of State and Defense. The Commission has not imposed a "political test" on the granting of a license or, as in *Kent* v. *Dulles*, *supra*, barred "innocent" members of the Communist Party from holding licenses. On the contrary, it has stated that membership in the Communist Party or in an organization advocating overthrow of the Government by violence was not automatically disqualifying and that the significance of any affiliation would be appraised in the light of all relevant facts after full hearing (J.A. 86, 88-89; *Lafferty*, *supra*, 23 F.C.C. at 765-766). Nor would petitioner be deprived of the traditional safeguards of confrontation and cross-examination at such hearing (J.A. 83, n. 1, R. 22; *Lafferty*, 23 F.C.C. at 770).[2] In the absence of procedures of "questionable constitutionality" (*Greene* v. *McElroy*, *supra*, 360 U.S. at 506), the express authority conferred by Section 303(l) to determine the qualifications of operators in the light of the purposes of the Act confers ample power upon the Commission to ask the questions here at issue.

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[2] In cases of this nature, the Commission requires the applicant "to refute specifically only those matters on which probative evidence was already introduced" by Commission counsel and holds the staff to the "most stringent standard of proof" (*Dispatch, Inc.*, 13 Pike & Fischer R.R. 237, 244, 280). Section 402(d) of the Communications Act, 47 U.S.C. 402(d), *infra*, p. 22, assures petitioner of a copy of the "order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency" (28 U.S.C. 2112).

3. Contrary to petitioner's assertions (Pet. 5, 6-8, 10), the Commission has not failed over the years to assert its authority to ascertain character qualifications, nor has it ever disclaimed such authority. During World War II, the Commission, by rule, required biographical information, including fingerprints and photographs, from applicants for operator licenses (F.C.C. Order No. 75, 5 F.R. 2394 (1940)).[3] Subsequently, the Commission "authorized a formal inquiry into any pertinent phase of the applicant's or licensee's qualifications to hold an operator's license under wartime conditions demanding loyalty and integrity" (9 F.C.C. Annual Report 81-82 (1943)) and at the same time revised its application form to require submission of information bearing on any criminal record of convictions (including particularly conviction of specified crimes relating to loyalty), a requirement still obtaining (J.A. 22-23). While some of

[3] Even before this time, the broadly phrased operator-licensing provisions of both the Radio Act of 1912, 37 Stat. 302, 303 and the Radio Act of 1927, 44 Stat. 1162, 1170, had been administered on the assumption that character qualifications, where appropriate, could be imposed. See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 13159, 65th Cong., 3d Sess., p. 444 (concerning Department of Commerce Reg. 401); Rules of the Federal Radio Commission, as revised October 3, 1933 (pamphlet ed. GPO 1934), Section 440. The present Commission's failure to adopt a provision in a 1938 proposed rule, requiring operators to be "physically, mentally, and morally capable of performing duty" does not, as petitioner suggests (Pet. 8), show that the Commission then believed it lacked authority to adopt such a rule; the provision was deleted without explanation, and this may well have resulted from a determination that no such inquiry was then necessary.

these requirements were relaxed at the end of the war (see 11 F.R. 1218, 6685), the Commission has continued to examine character qualifications on a case-by-case basis since that time. See *John M. Moreno*, 14 F.C.C. 424 (1950); *Travis Lafferty*, 23 F.C.C. 761; *Didriksen*, 13 Pike & Fischer R.R. 425, affirmed, *Didriksen* v. *Federal Communications Commission*, *supra*. This practice was codified as Section 1.71 of the Commission's Rules in 1957 (22 F.R. 10981) (App. *infra*, pp. 24-25).

This history is not negated by Commission statements that it lacked authority to *suspend* an operator's license for any reasons other than those expressly set out in Section 303(m)(1) of the Act (see, *e.g.*, Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., on H.R. 3052, p. 2);[4] by its failure to adopt proposed rules which would have *disqualified* present members of the Communist Party;[5] or by its objections (set

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[4] Contrary to petitioner's suggestion (Pet. 11), there is no inconsistency between the existence of broad power to ascertain character qualifications in issuing or renewing licenses, and limiting suspension, during the license period, to specified acts. In fact, the very limitation on the suspension powers emphasizes the Commission's responsibility in initially determining an applicant's qualifications to operate radio equipment in the public interest.

[5] The Commission's Proposed Report and Order in this proceeding, upon which petitioner relies (Pet. 8), expressly reaffirms its authority to consider an applicant's qualifications (including loyalty factors) on a case-by-case basis. See 1 Pike & Fischer R.R., Part II, p. 63:ix, at 63:x.

forth in a 1941 memorandum to the Congress) to being *obligated* to undertake broad security functions which it believed other governmental agencies were better equipped to handle. See Hearings before a Subcommittee of the Senate Committee on Commerce on H.R. 5074, 77th Cong., 1st Sess., pp. 77-79. All of these positions are consistent with its exercise of authority to consider matters bearing on a particular applicant's loyalty or reliability in determining his basic qualifications to be a licensee.

4. The legislative history of Section 303(l) does not warrant petitioner's assertion (Pet. 8-10) that Congress has made clear its intent to preclude the Commission from ascertaining the character qualifications (including loyalty factors) of applicants for operators licenses. There is no relevant pre-enactment history with respect to the term "qualifications" as used in Section 303(l) of the Communications Act of 1934 or in its predecessor, Section 20 of the Radio Act of 1927, 44 Stat. 1170. However, the draftsmen of the original Radio Act of 1912 recognized that Section 3 of that Act (37 Stat. 302, 303), providing generally that radio apparatus shall "be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce and Labor," vested discretion in the Secretary to prescribe qualifications which "might go to his character" or "to any thing that relates to his general efficiency." (Hearings on S. 3620 and S. 5334 before a Subcommittee of the Senate Committee on Commerce, 62d Cong., 2d Sess., pp. 33-34).

The post-enactment legislative history of the Communications Act does not support petitioner's view. It is true that during consideration of several bills (in the immediate pre-war period) which would have established comprehensive security systems governing both issuance and suspension of operator licenses, Congressman Ramspeck, and perhaps Congressman Dirksen as well,[6] indicated a belief that the Commission had no right "to make inquiry about anything except the technical qualifications of radio operators" (87 Cong. Rec. 6259; see Hearings on H.R. 2662 before the House Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess., p. 10).[7] On the other

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[6] The quoted Dirksen statement, Hearings on H.R. 2662 before the House Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess., p. 10, may well have been directed to the Commission's admittedly more restricted powers of suspension.

[7] Of all of the bills referred to by petitioner (H.R. 10416, 76th Cong., 3d Sess., H.R. 2662, 77th Cong., 1st Sess., H.R. 3364, 77th Cong., 1st Sess., and H.R. 5071, 77th Cong., 1st Sess.) only H.R. 5071 was reported out of Committee. This bill, as it passed the House, directed the Commission to deny licenses to "subversive" persons and authorized suspension on such grounds. The provision seems to have stemmed, at least in part, from a contemporaneous statement by the Commission to the House Committee on Appropriations that it had never suspended operator's licenses on grounds of "subversive activities;" that aside from citizenship data—including fingerprints and biographical information—it did not then require operators to submit information bearing on such activities; and that the Commission did not have facilities to make investigations of thousands of operator licensees for "subversive activities." See Hearings before the Subcommittee of the House Committee on Appropriations on the Independent Offices Appropriation Bill for 1942, 77th Cong., 1st

hand, in a 1937 amendment to the Act broadening the suspension provisions of Section 303(m) (50 Stat. 189, 190), the Senate Committee had made clear that its bill "seeks so far as statutes may encompass this end to assure the highest type of character and qualification in the operators on ships of the United States" (S. Rep. No. 196, 75th Cong., 1st Sess., p. 4).

The most significant post-enactment expression of legislative intent in relation to the Commission's power under Section 303(l) was made at the time of amendment of that section in 1958 (72 Stat. 981). A bill (sponsored by the Commission among others) was offered to authorize the Commission to exempt from the citizenship requirements of 303(l) certain

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Sess., pp. 658-660. The Ramspeck statement, cited above, was made in connection with House debates on this bill. But after the broad loyalty check function had been placed in the hands of the Navy Department, rather than the Commission, by the Conference Committee on the bill, Congressman Bland, author of the original bill and floor manager for the conference bill, was of the view that "much of the danger in the merchant marine today from subversive radio operators is due to the fact that the Federal Communications Commission has not in the past used due diligence in cleaning out that nest of hornets" (87 Cong. Rec. 9628). The statement by Admiral Hooper, cited by petitioner, was merely that the Commission had no power to "take away or suspend their licenses" for subversive activities or character defects, and the statement by Secretary Stimson is only that the "War Department is of the opinion that the powers of the President and the Federal Communications Commission are at present inadequate to deal properly with subversive elements in the maritime radio communication field." Hearings before a Subcommittee of the Senate Committee on Commerce on H.R. 5071, 77th Cong., 1st Sess., pp. 71, 75.

holders of United States and foreign airplane pilot certificates. In the House, an amendment was inserted to require the Commission to find "that security conditions have been satisfied" before waiving the citizenship requirements. In opposing this provision, the Commission stated (S. Rep. No. 2338, 85th Cong., 2d Sess., p. 5):

> The Commission has previously interpreted public interest as encompassing authority to examine the character qualifications of persons seeking radio operators licenses and, where information is brought to our attention which might show that the issuance of such license would jeopardize the security of the United States, as authorizing this agency to refuse to issue such license. The language proposed in this bill, without the language italicized, is consistent with this view. However, the italicized language, by requiring an affirmative finding that security considerations have been satisfied, would appear to place upon the Commission a responsibility to require a complete investigation of every applicant's background preliminary to such finding.
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> * * * *
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> The present statute requiring a license be issued only upon a finding that its issuance is in the public interest is sufficient to permit this Commission to deny license applications in those cases where security questions are involved, without requiring it to undertake the responsibility of making affirmative findings with respect to the security qualifications of each applicant which comes before it.

As a result of this presentation, Congress deleted the requirement for an affirmative security clearance. In explaining this action, the Senate Report stated (*id.*, p. 3):

> Under the provisions of the Federal Communications Act of 1934, as amended, the Federal Communications Commission is required to find, with regard to every license issued by it, that the public interest will be served thereby. *In making this finding, the Commission necessarily must weigh the character qualifications of persons seeking radio operator licenses. The committee desires to emphasize that this bill, as amended, does not relieve the Commission of this affirmative responsibility.* [Emphasis added.]

5. Petitioner's assertion (Pet. 11-12) that the First Amendment prohibits any governmental inquiry as to Communist Party membership[*] is untenable. The fact that "political affiliations" are "circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant" (*American Communications Association* v. *Douds*, 339 U.S. 382,

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[*] Petitioner does not claim any constitutional bar to the inquiry as to membership in any group or organization advocating the violent overthrow of the Government. This question, the Commission pointed out, was "directed solely to unlawful activity" (J.A. 97) and therefore does not present any issue as to whether "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end," would be a permissible subject of Commission inquiry regardless of its lawfulness under the Smith Act (18 U.S.C. 2385, *et seq.*). *Yates* v. *United States*, 354 U.S. 298, 318.

391). The aim of the Commission's inquiry is "not to penalize political beliefs" but to ascertain whether petitioner is qualified to be licensed for "positions by virtue of which [he] could, if evilly motivated, create serious danger to the public safety" and national defense (*Speiser* v. *Randall*, 357 U.S. 513, 527). See *Beilan* v. *Board of Education*, 357 U.S. 399, 405. The First Amendment "does not require that he be permitted to be the keeper of the arsenal" (*American Communications Association, supra*, 339 U.S. at 412), or relieve him of the "obligations of frankness, candor and cooperation" with respect to inquiries relevant to his qualifications for a radio operator's license (*Beilan, supra*, 357 U.S. at 405). *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 227. Thus, even if petitioner had a right to refrain from answering the questions, the Commission was not obligated to grant the licenses in circumstances where the consequence of petitioner's failure was to disable the Commission from finding that petitioner had met the burden of establishing his qualification.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Additional pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), are as follows:

Sec. 402(d). Upon the filing of any such notice of appeal the Commission shall, not later that five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

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INQUIRY BY COMMISSION ON ITS OWN MOTION

Sec. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power

to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

* * * *

Sec. 606(c). Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners. The authority granted to the President, under this subsection, to cause the closing of any station or device and the removal therefrom of its apparatus and equipment, or to authorize the use or control of any station or device and or its apparatus and equipment, may be exercised in the Canal Zone.

* * * *

Additional pertinent provisions of the Commission's Rules and Regulations (47 C.F.R. 1.71) are as follows:

> Sec. 1.71. *Procedure with respect to commercial radio operator license applications.* (a) Upon acceptance for filing of an application for a new commercial operator license, an examination is conducted, where required, by the field office with which the application is filed in accordance with Part 13 of this chapter. If applicant passes the examination and is found qualified in respect to citizenship, character, and physical condition, the license will be issued. Where doubts as to citizenship, character, or physical condition arise, the application is referred to the Commission's Inspection and Examination Division, Field Engineering and Monitoring Bureau, Washington, D. C., for consideration. If it appears that further information is required to determine the applicant's qualifications or that a grant of the application will not serve the public interest, the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. If, from the information furnished, it does not appear that the applicant is qualified or that the public interest would be served by a grant of the application, the applicant will be advised thereof in writing and given the opportunity to request, within the period of time to be specified in such writing, that the application be set for hearing. In case of failure timely to request such hearing, the application will be denied.

(b) Where an examination is not required, the application will be handled with respect to other matters in accordance with the procedure in paragraph (a) of this section.

(c) Applications for renewal of license after acceptance for filing are handled in accordance with the procedure contained in paragraph (a) of this section, except that no examination is required unless the circumstances as set forth in § 13.28 of this chapter exist, in which case a renewal examination will be required.

(d) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be made with prejudice after an application has been designated for hearing.